SARAWAK ELECTRICITY SUPPLY CORPORATION & ORS

v.

KWAN CHOON KIONG

HIGH COURT SABAH AND SARAWAK, KUCHING
LAU BEE LAN JC
[CIVIL APPEAL NO: 12-20-2002-II]
9 JUNE 2003

CIVIL PROCEDURE: *Appeal - Procedural requirements not met - Delay in service of notice of appeal - Omission to file memorandum of appeal - Omission to file notice of change of solicitor - Whether there was a proper appeal before the court - Whether irregularities could be rectified - Subordinate Courts Rules 1980, O. 49 r. 2(5), (6) - Rules of the High Court 1980, O. 55 r. 2(1), (2), O. 64, O. 92 r. 4*

In this appeal against the decision of the sessions court, the respondent submitted that there was no proper appeal before the court as a notice of change of solicitor and the memorandum of appeal were not filed. It was argued that there was non-compliance with O. 49 r. 2(5) and (6) of the Subordinates Courts Rules 1980 ('SCR') and O. 55 r. 2(1) and (2) and O. 64 of the Rules of the High Court 1980 ('RHC'). The respondent also submitted that the appellants' omission to file the memorandum of appeal had prejudiced the respondent. The appellants submitted that they did not file the memorandum of appeal due to a genuine oversight on their part and requested the court to proceed to hear the appeal.

Held:

[1] There was a delay of three days in the service of the notice of appeal. The appellants did not apply for an extension of time supported by an affidavit giving reasons why the notice of appeal was served out of time. This was crucial and hence the appeal should be dismissed in accordance with O. 55 r. 4(3) RHC. (pp 386 d-h & 387 a-d)

[2] The appellants failed to file the memorandum of appeal within 14 days from the date of service of Form 141 RHC contrary to O. 55 r. 2(1) and (2) RHC. Further, there was no application for an extension of time to file it at a later date. The non-compliance was fatal to the appeal. (p 389 a-c)

[3] A memorandum of appeal gives appropriate notice to a respondent of the grounds of appeal to enable him to prepare his arguments to oppose those grounds. Therefore, without the memorandum of appeal, the respondent would be prejudiced. The court too would be handicapped as it would not be able to fathom on what grounds the appellants were challenging the decision of the learned sessions court judge. (p 390 e-g)

[4] There were no efforts made on behalf of the appellants to file an application for extension of time to serve the notice of appeal and file and serve the memorandum of appeal although there were ample opportunities to do so. The oral excuse given by the appellants that it was a genuine oversight was not acceptable. Such non-compliance had occasioned a miscarriage of justice under O. 2 r. 3 RHC and did not warrant the court to exercise judicial discretion in the appellants' favour.
(pp 390 h & 391 a-b)

[5] The court could not exercise its inherent jurisdiction under O. 92 r. 4 RHC in the appellants' favour. The powers of the court under its inherent jurisdiction are complementary and it supplements and reinforces the Rules of the Court. To allow the application of the appellants to proceed with the appeal without the memorandum of appeal would be erroneous in the light of O. 92 r. 4 read with O.1A, O. 2 r. 3 and O. 55 r. 2(1) and (2) RHC. (p 393 b-d)

[6] An omission to file a notice of change of solicitor under O. 64 r. 1 RHC, whether fatal or otherwise, would depend on the circumstances of the case. There was no substantial miscarriage of justice to the respondent due to the omission to file the said notice. The change herein only involved a change of trading name that constituted a technical non-compliance. The appellants could rectify this irregularity giving an undertaking to file the said notice with all convenient speed. However, notwithstanding the fact that non-compliance with O. 64 r. 1 RHC was not fatal, there was no proper appeal before the court due to the non-compliance of the other provisions of the RHC. (p 394 a-h)

[Appeal dismissed with costs.]

Case(s) referred to:

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

Elayachee v. Woo Siu Tip [1991] 3 MLJ 108 ***(refd)***

Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd [1999] 1 CLJ 337 CA ***(foll)***

Michael Chong Shui Keong v. Fong Shui En [1996] 5 MLJ 177 ***(foll)***
Othman Puteh & Anor v. Ku Azman Ku Bahari [2002] 7 CLJ 64 HC ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Valiant Leather Products (M) Sdn Bhd & Ors [2000] 6 CLJ 163 HC ***(refd)***
PP v. Mohd Ramlee Malaini (Criminal Case No BTG-83-03-2003) ***(refd)***
Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Siang Galau v. Ang Wok Hiong [1994] 1 CLJ 82 HC ***(foll)***
United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***
Vong Ban Hin v. Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 HC ***(refd)***
Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 2) [1998] 4 CLJ 209 HC ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 108
Rules of the High Court 1980, O. 1A, O. 2 r 3, O. 3 r 5, O. 55 rr. 2, 2(1), (2), 4(2), (3), O. 64 r. 1, 1(1), O. 92 r. 4, Forms 113A, 138, 141
Subordinate Courts Rules 1980, O. 2, O. 49 rr. 2(3), (5), (6), 6

Other source(s) referred to:
Sir Jack Jacob QC, *The Inherent Jurisdiction of the Court* [1970] Current Legal Problem 23, pp 40, 41, 50, 51

For the appellants - M/s Hazmi, Sidhu & Assoc
For the respondent - M/s Loke, King, Goh & Partners

Reported by Usha Thiagarajah

JUDGMENT

Lau Bee Lan JC:

Background

The appellants in this case were the defendants in the Sessions Court at Kuching. *Vide* her judgment dated 19 April 2002, the learned Sessions Court judge following a full trial gave judgment in favour of the respondent/plaintiff. Being dissatisfied with the decision, the appellants appealed.

The Appeal was fixed for hearing before me on 7 May 2003. However, M/s Abdul Rahman & Associates for the appellants *vide* letter dated 5 May 2003 ("the letter") requested the court to reschedule the Appeal. The reasons were that counsel in charge of the said Appeal would be involved in an outraging modesty case, *PP v. Mohd Ramlee bin Malaini* (Criminal Case No. BTG-83-

03-2003), which has been fixed for trial on 5 May 2003 to 10 May 2003 in the Magistrate's Court, Betong, Sri Aman and the main witness, the victim, is a teacher now posted in West Malaysia and other outstation police witnesses would also be giving evidence for the prosecution.

Apparently the respondent had no objection to the request. However, the court did not grant the request. On 7 May 2003, Mr Yong Sie Mee and Encik Jamsari Mohammad appeared for the respondent and appellants, respectively. Mr Yong informed the court that he was ready to proceed but requested for a short date if court was minded to accede to the request. The hearing for the Appeal was adjourned to 16 May 2003.

On 16 May 2003 the same learned counsel appeared for the parties. This time around Encik Jamsari informed the court that Encik Abdul Rahman bin Mohd Hazmi, as counsel in charge of the matter was engaged in two other criminal submissions before the Sessions Court and Magistrate's Court; however he had received instructions to proceed.

At this juncture, Mr Yong drew the court's attention to two elementary matters which he contended were not done for the Appeal, namely: (i) notice of change of solicitor has not been filed; and (ii) No Memorandum of Appeal has been filed up to this stage of hearing.

Contentions Of Counsel

Encik Jamsari confirmed that no Memorandum of Appeal has been filed "purely due to genuine oversight on our part" and it is his instructions to request court to hear the matter in the absence of the Memorandum of Appeal.

In response to the court's query on the non-filing of the notice of change of solicitor, the learned counsel replied that he was unable to explain as he had just joined the firm in February 2003 and he left the matter to the court's discretion and decision.

Mr Yong, submitted that under normal circumstances an appellant would file an application for abridgement of time to file the Memorandum of Appeal. *Vide* his written submission, the learned counsel contended the following:

1. Non-compliance with O. 49 r. 2(5) and (6) of the Subordinate Courts Rules 1980 ("SCR");

2. Non-compliance with O. 55 r. 2(1) and (2) of the Rules of the High Court 1980 ("RHC"). The cases of *Michael Chong Shui Keong @ Michael Chong v. Fong Shui En* [1996] 5 MLJ 177 and *Siang Galau v. Ang Wok*

Hiong [1994] 1 CLJ 82 were cited in support of paras 1 and 2, respectively; and

3. The present firm of Messrs Abdul Rahman & Associates has no *locus standi* to act for the appellants until proper procedural requirements under O. 64 RHC ie, a Notice of Change of Solicitor (Form 138 of the RHC) has been filed and served by them. *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 2)* [1998] 4 CLJ 209 was cited as authority that the words "until the final conclusion of the cause or matter" in O. 64 r. 1(1) of the RHC would mean that until the notice of change of solicitor is filed, Messrs Hazmi, Sidhu & Associates are still the solicitors acting for the appellants. Further the partnership of Messrs Hazmi, Sidhu & Associates have been dissolved.

It is the learned counsel's contention that non-compliance with O. 49 r. 2(6) of the SCR and O. 55 r. 2(1) and (2) of the RHC is fatal based on *Michael Chong Shui Keong* and *Siang Galau (supra)* and he urged the court to exercise its discretion to dismiss the Appeal by virtue of O. 55 r. 4(2) and (3) of the RHC.

Alternatively, the learned counsel submitted that if the court rejects the abovementioned submission for whatever reason, he urged the court to consider that the appellants' failure to comply has seriously prejudiced the respondent who is not in a position to address the issues which the appellants proposed to address if the court was minded to proceed without the Memorandum of Appeal.

In relation to the invocation of O. 92 r. 4 of the RHC, the learned counsel submitted that neither of the situations envisaged in the said Order applies to this proceedings and they stand by their submission.

Findings And Evaluation Of The Court

Order 49 r. 2(5) and (6) of the SCR reads:

(5) Within 14 days from the receipt of the notification [Form 141], the appellant shall, unless the Court for sufficient cause otherwise orders:

(a) deposit in the Court appealed from a sum which in the opinion of the Registrar will cover the costs of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and

(b) lodge in the Court appealed from a sum of two hundred and fifty ringgit, or such lesser sum as the Court may in any case direct, by way of security for the costs of the appeal,

(6) The notice of appeal shall be served by the appellant [within the time limited for the filing of appeal] on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected.

As far as O. 49 r. 2(5) of the SCR is concerned, I fail to see why the learned counsel for the respondent raises the provision as an issue for consideration. I find that the appellants have duly complied with that provision as they had deposited a sum of RM250 as security for costs on 18 July 2002 *vide* receipt No. 6300024891. This is evident from the letter of the Registrar of the Sessions Court, Kuching dated 22 July 2002 to the Registrar of the High Court, Kuching (encl.1).

I will now consider whether there has been compliance with O. 49 r. 2(6) of the SCR. In the instant case, the judgment of the learned Sessions Court Judge was pronounced on 19 April 2002. The Notice of Appeal was filed on 3 May 2002 and was served on respondents' solicitor on 6 May 2002. The court has no record of the later date and assumes that the date of service, 6 May 2002, as submitted by learned counsel for the respondent is correct. Based on O. 49 r. 2(3) of the SCR the Notice of Appeal should be filed on 3 May 2002 and this was complied with. Pursuant to O. 49 r. 2(6), the Notice of Appeal should have been served on the respondent or his solicitor on 3 May 2002 [ie, within the time limited for the filing of appeal]. Since the Notice of Appeal was served on 6 May 2002, there has been a delay of three days. No application had been made by the appellants' counsel for an extension of time supported by an affidavit giving reasons why the Notice of Appeal was served out of time.

In *Michael Chong Shui Keong (supra)*, the High Court had to determine, *inter alia*, whether the delay in serving the notice of appeal and the memorandum of appeal was a mere irregularity curable under O. 2 of the RHC and O. 2 of the SCR and whether the court was empowered under O. 3 r. 5 of the RHC to extend or abridge the period within which a person is required by the rules to do any act in any proceeding. His Lordship, Tee Ah Sing JC (as he then was) in dismissing the appeal at p. 183 stated:

> He [Appellant/Respondent's counsel] has not made an application supported by affidavit giving reasons why he had served the notice of appeal five days late and why he filed and served the memorandum of appeal out of time.

What the appellant/respondent's counsel should have done is to apply to the High Court for an extension of time by an application supported by affidavit (see *Mohd Afsar Yunus v. Handal Utama Sdn Bhd* [1995] 2 CLJ 118 at p. 127 and *Siang Galau v. Ang Wok Hiong* [1994] 1 MLJ 42).

Order 55 r. 4(3) of the RHC provides:

(3) **If the memorandum of appeal is not filed** or is not served within (the prescribed time **and no sufficient ground is shown for the delay the appeal may be dismissed.**

(Emphasis added).

Hence, following *Michael Chong Shui Keong (supra)*, I would concede with learned counsel for the respondent that the delay in serving the Notice of Appeal as required under O. 49 r. 2(6) of the SCR and the omission on the part of counsel for the appellants to apply to the High Court for an extension of time by an application supported by affidavit explaining the reasons for delay is crucial and it warrants the court to exercise its discretion to dismiss the Appeal in accordance with O. 55 r. 4(3) of the RHC.

Next, I will consider whether there is a need to comply with O. 55 r. 2(1) and (2) of the RHC which provides:

(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49, rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.

(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

Based on the letter dated 22 July 2002 (encl. 1) the appellants had been served with Form 141 dated 19 June 2002 on 4 July 2002. Thus the appellants would have to file the Memorandum of Appeal in Form 113A in duplicate in the High Court, and serve a copy of the same and a copy of the appeal record on the respondent, the latest, by 18 July 2002. However it is not disputed that no Memorandum of Appeal has been filed at all. Neither has counsel for the appellants applied for extension of time to file the same.

In *Siang Galau (supra)*, the issue before the High Court was whether O. 55 r. 2(1) and (2) of the RHC require the filing and the service of the memorandum of appeal within fourteen days from the date of service of Form 141 on the appellant through his advocate.

In expressing his view on O. 55 r. 2(1) and 2 of the RHC, his Lordship Chong Siew Fai J (as he then was) opined:

> Thus, O. 55 r. 2(1) and (2) ..., require an appellant to file and serve the memorandum of appeal within 14 days from the service of Form 141 under O. 49 r. 2(4) or O. 49 r. 3(2) of the SCR.
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> Now, although O. 49 r. 3 of the SCR applies to appellants who are not represented by advocates or who appeal as poor persons, O. 49 r. 2(4) is a general provision. It reads: 'As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.'
>
> The insertion of the said O. 49 r. 2(4) into O. 55 r 2(4) (I believe it should read O. 55 r. 2(1)) of the RHC by PU(A) 462/90 clearly covers, in my opinion, all appellants other than those unrepresented by advocates or are poor persons. Thus, it applies to an appellant who is represented by an advocate. **Now, reading O. 55 r. 2(1) and (2) of the RHC in conjunction with that of O. 49 r. 2(4) of the SCR, it appears clear that the memorandum of appeal must be filed** and a copy thereof served on the respondent/plaintiff within 14 days after service of Form 141 on the appellant who is represented." (Emphasis added).

The learned judge had followed *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108 where Eusoff Chin J (as he then was) had expressed a similar view (see p 110 D-F). His Lordship Chong Siew Fai J had dismissed the appeal as he held that the memorandum of appeal was filed and served out of time and no extension of time was applied for and obtained for the late filing and service.

At this juncture, it would be pertinent to refer to *Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd* [1999] 1 CLJ 337. In this case the appeal concerned the operation of O. 49 r. 6 of the SCR and O. 55 r. 2 of the RHC and the issue that had arisen in the application of the two rules is whether a memorandum of appeal is required to be filed by the appellant where he appeals against a decision other than a decision made after trial. The court had to decide whether the judge had rightly adopted the interpretation of O. 49 r. 6 of the SCR given in *Vong Ban Hin v. Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852 that there was no necessity to file a memorandum of appeal in an appeal against a decision other than a decision made after a trial. His Lordship Gopal Sri Ram JCA, in delivering oral judgment on behalf of the Court of Appeal which held that the interpretation of O. 49 r. 6 of the SCR in *Vong Ban Hin (supra)* was correct, at p. 309 D said, "The true purpose and objective of O. 49 r. 6 of the SCR was to provide for a summary and speedy disposal of appeal against decision of the subordinate courts made in interlocutory proceedings including an application under O. 26A of the SCR."

By virtue of the Court of Appeal decision it is my view that impliedly it means that the legal position taken in that a memorandum of appeal has to be filed within the requisite period as stipulated under O. 55 r. (1) and (2) of the RHC in an appeal against a decision made after a trial is unequivocal. Thus in the present case, as the Appeal is against a decision made after trial, it is essential that the Memorandum of Appeal has to be filed within fourteen days from the date of service of Form 141 ie, the final date being 18 July 2002. But as mentioned earlier, the appellants had failed to file the Memorandum of Appeal and no extension of time was applied to file it at a later date. Hence premised on the cases of *Siang Galau* and *Kwong Yik Bank Bhd (supra)*, I concede with learned counsel for the respondent that the non-compliance by the appellants is fatal and the Appeal should be dismissed with costs.

Notwithstanding the views expressed hereinbefore, I find it is necessary to consider the alternative argument submitted by the respondent that he has been seriously prejudiced by the appellants' failure to comply with the RHC. The reason being this alternative argument, appears to allude to O. 1A and O. 2 r. 3 of the RHC which are provisions inserted by the Rules of the High Court (Amendment) 2002 (PU(A) 197/2002) which came into effect on 16 May 2002 whereas the decisions of *Siang Galau*, *Michael Chong Shui Keong* and *Kwong Yik Bank Bhd* were pre-amendment.

Order 1A of the RHC provides:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

Order 2 r. 3 of the RHC further provides:

> 3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

I am conscious of the fact that these provisions were incorporated with the intention "to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections." (per Low Hop Bing J in *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 at p. 692 e-g).

In *Beauford*'s case there was "an application for extension of time to file a notice of appeal" and the issue was whether a solicitor's mistake in interpreting a provision of the law governing the time limit for filing a notice of appeal was a good and sufficient ground for granting an extension. The learned judge allowed the defendant's appeal against the decision of the magistrate refusing extension of time. In *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 followed by *Beauford (supra)*, the Court of Appeal overruled the preliminary objection that the appellant's notice of appeal filed out of time was a mere technicality. It held that such procedural technical objection should not be allowed to obstruct the process of giving justice to the deserving. However it is to be noted that his Lordship Ahmad Fairuz JCA (now Chief Justice Malaysia) in delivering judgment on this point had expressly said at p. 37, "The notice of appeal had been filed anyway".

In contrast to the above two decisions, in *Othman Puteh & Anor v. Ku Azman Ku Bahari* [2002] 7 CLJ 64 his Lordship Vincent Ng J found that there was gross inordinate delay on the part of the appellants' solicitors (application for extension of time to file the appeal record was lodged nine months after the first hearing date); counsel showed indifferent conduct as until, the hearing date, there was no application for extension of time to file the memorandum of appeal and no explanation for the delay was tendered except for a plea of miscalculation of dates. His Lordship dismissed the appeal on finding negligence on the part of the appellants' solicitors and the commission of breaches that were not only blatant and culpable but also varied and multiple.

Reverting to the case before me, I am mindful of the fact that a memorandum of appeal is significant and essential in the sense that it gives appropriate notice to a respondent of the grounds of appeal to enable him to prepare his arguments to oppose those grounds, and if necessary, to file a notice of cross-appeal for a variation of the lower court order (see pp. 44I to 45A of *Siang Galau* and p. 110 D-E of *Elayachee (supra)*. In my view, without the Memorandum of Appeal, not only is the respondent prejudiced in this case but the court is also "handicapped" as it is not able to fathom on what grounds the appellants are challenging the decision of the learned Sessions Court judge.

Furthermore, learned counsel made no efforts whatsoever to file an application for extension of time to serve the Notice of Appeal and file and serve the Memorandum of Appeal although there were ample opportunities for him to do so. The Record of Appeal was filed on 14 August 2002 and the 1st date of hearing was 24 January 2003, but was adjourned to 7 May 2003 and subsequently to 16 May 2003. In the light of the time frame mentioned, I find

that the excuse, given orally, for not filing the Memorandum of Appeal ie, "genuine oversight" is not acceptable. Based on the facts before me, I am of the opinion the cases of *United Malayan Banking Corp Bhd* and *Beauford* can be distinguished. Further, having regard to the conduct of the appellants' counsel and the necessity for a Memorandum of Appeal, I am of the opinion that "such non-compliance has occasioned a substantial miscarriage of justice" under O. 2 r. 3 of the RHC. Under the circumstances I am of the view that the situation does not warrant me to exercise judicial discretion in the appellants' favour.

With regard to the issue of whether the court can exercise its discretion of inherent jurisdiction, it is indeed pathetic to note that learned counsel for the appellants did not proffer any authorities at all although he was seeking the court to invoke it.

The pertinent section is O. 92 r. 4 of the RHC which provides:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

To comprehend the concept of "inherent jurisdiction" or "inherent powers" it would be useful to refer to the Federal Court case of *Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147. His Lordship Edgar Joseph Jr FCJ, in his additional judgment in reply to his Lordship Wan Yahya FCJ's dissenting judgment which criticized reliance on the inherent jurisdiction of the High Court in the case, had expressed that the nature, extent, juridical basis and relation between the inherent jurisdiction and the Rules of Court have been correctly stated by Sir Jack Jacob QC, the former Senior Master of the Supreme Court (UK) in his article – *"The Inherent Jurisdiction of the Court"* [1970] Current Legal Problems 23.

"Inherent jurisdiction" has been defined by the learned author at p. 51:

> ... as being the reserve or fund of powers, a residual source of powers, *which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them*. (Emphasis added)

The relation between inherent jurisdiction and Rules of Court has been described by the learned author at p. 50 as:

> The powers of the court under its inherent jurisdiction **are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other**. The inherent jurisdiction of the court is a most valuable adjunct to the powers conferred on the court by the Rules. (Emphasis added)

The usefulness of inherent jurisdiction has been stated by the learned author at pp. 50 and 51 in the following manner:

> On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins. This is shown in three important respect in which the powers arising out of the inherent jurisdiction differ from those conferred by Rules of Court. First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings. Thirdly, they can be used to punish the offender by fine or imprisonment.

It is observed that the definition of "inherent jurisdiction" as stated by the learned author contains elements which implies the circumstances wherein which the court may exercise its inherent jurisdiction ie, "whenever it is just and equitable to do so," "in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

At pp. 40 to 41 the learned author comments that the term "abuse of process" is:

> ... a term which has great significance in relation to inherent jurisdiction of the court as well as under the Rules of the Supreme Court. It *connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation*. (Emphasis added).

Under O. 92 r. 4 of the RHC, the High Court may make any order as may be necessary "to prevent injustice" or "to prevent an abuse of the process of the court". It is observed that the elements found therein is similar to the

circumstances under which the court can invoke its inherent powers as opined by the learned author with regard to the definition of "inherent jurisdiction" and "abuse of process" quoted above. Hence, I am of the view that a similar approach can be accorded to O. 92 r. 4 of the RHC when interpreting the said provision.

In the circumstances of the case before me, bearing in mind the unsatisfactory oral explanation for non-compliance of the relevant provisions of the RHC and the importance of a Memorandum of Appeal as adverted to earlier, the court would be failing in its duty in giving effect to the words "to prevent injustice" or "to prevent an abuse of the process of the court" contained in O. 92 r. 4 of the RHC if the court is to accede to the appellants' request.

Mindful also of the fact that the powers of the court under its inherent jurisdiction are complementary and it supplements and reinforces the Rules of Court, I am of the view that to allow the application of the appellants to proceed with the Appeal without the Memorandum of Appeal would be erroneous in the light of O. 92 r. 4 read with O. 1A, O. 2 r. 3 and O. 55 r. 2(1) and (2) of the RHC.

With regard to the issue of whether Messrs. Abdul Rahman & Associates has the *locus standi*, the learned counsel for the respondent had referred to *Yukilon Manufacturing Sdn Bhd (supra)*. I agree with the decision of his Lordship Abdul Malik Ishak J in the said case that "the language employed in [O. 64 r. 1(1) of the RHC] is quite clear and unambiguous" and that the words "until the final conclusion of the cause or matter" appearing in the said Order in the context of the case before the learned judge would mean that until judgment had been worked out, the previous solicitor would remain on record.

However in the case of *Perwira Habib Bank Malaysia Bhd v. Valiant Leather Products (M) Sdn Bhd & Ors* [2000] 6 CLJ 163, where in an appeal, a similar argument was contended by counsel for the plaintiff, his Lordship Mohd Ghazali J (as he then was) at p. 169 d-e stated:

> I would agree with counsel for the plaintiff that execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action and Messrs Thiyages, Pauline Ng & Co (current solicitor) should have complied with O. 64 r. 1 of the Rules. However, seeing that it is not clear as to whether the learned senior assistant registrar dismissed encl. 19 on this point and looking at the circumstances of the case, I am of the view that **such an omission is not fatal. To rule otherwise would cause injustice to the third defendant as surely he cannot be faulted for such omission**. (Emphasis added).

Thus it would appear from the two cases which I have cited by way of illustration, whether an omission to file a notice of change of solicitor is fatal or otherwise would depend on the circumstances.

I am mindful of the fact that both the cases were decisions prior to the advent of O. 1A and O. 2 r. 3 of the RHC. Bearing in mind the purpose of the provisions (which I have alluded to earlier), I would have to examine the circumstances of the case before me. From the court's file, Messrs Abdul Rahman & Associates were the solicitors on record from the commencement of hearing (27 August 1999) till the date of delivery of judgment (19 April 2002). This is evident from the documents contained in the Appeal Record (Part B) (encl. 7) which, *inter alia*, comprise the following documents: (i) Notes of Proceedings (pp. 58 and 133), (ii) Written Statement of Agreed Facts (p. 137) and (iii) reply to the defendants' submission (p. 228).

Even as at the time of filing of the Notice of Appeal, the said solicitors were still on record as is evident from the Notice of Appeal filed by them dated 3 May 2002 contained in the Appeal Record (Part A) (encl. 7). The court observes that the said firm filed a notice of change of solicitor dated 14 August 2002 (encl. 6) on even date to notify that Messrs Hazmi, Sidhu & Associates have been appointed to act for the appellants in place of Messrs Abdul Rahman & Associates. However, if as stated by the learned counsel for the respondent, the firm of Messrs Hazmi, Sidhu & Associates have been dissolved and a new trading name has been registered, this change has not been notified to the court as the correspondence from the court, in particular, "notice of hearing" was still addressed to "Tetuan Hazmi, Sidhu & Associates: (encl. 11). Be that as it may, to my mind, there has been no substantial miscarriage of justice occasioned to the respondent as at the date of the hearing of the Appeal. I find that for all intents and purposes it involves only a change of trading name which constitutes a technical non-compliance. I believe the irregularity can be rectified by the learned counsel for the appellants giving an undertaking to file a notice of change of solicitor with all convenient speed (see s. 108, Interpretation Acts 1948 and 1967 (Act 388)).

Conclusion

In the light of the foregoing reasons, I conclude that notwithstanding the fact that non-compliance with O. 64 r. 1 of the RHC (failure to file notice of change of solicitor) is not fatal, there is no proper appeal before the court. Hence, by virtue of O. 55 r. 4(2) and (3) of the RHC, this Appeal is accordingly dismissed with costs.